IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.549 OF 2005
IN
EXECUTION APPLICATION NO.183 OF 2004
IN
SUM. SUIT NO.1510 OF 2002

G.M.Breweries Ltd. ..Plaintiff.

V/s.

M/s.Siddhivinayak Builders & Anr...Defendants.

And

National Health & Education
Society & Anr. ..Applicants.

Mr.H.Toor i/b Crawford Bayley & Co. for Applicants.

Mr.O.A.Das for Plaintiff.

CORAM: A.M.KHANWILKAR,J

DATE : JUNE 15, 2005.

P.C. :

1. Heard counsel for the parties.

2. By this chamber summons, applicants who are the third parties pray that Warrant of attachment dated 5th July, 2004 issued in respect of the disputed premises situated at CTS No.118, admeasuring 1525 sq.mtrs. together with building/structure thereupon known as "Emerald Court" ‘D’ Wing (referred to as ‘A’ Wing in Municipal Records) admeasuring built-up area of about 4004.18 sq.mtrs situate at

Ramakrishna Mandir Marg, Andheri-Kurla Road, Kondivita, Andheri (East), Mumbai 400 059, be raised and/or set aside and Warrant of Sale dated 7th October, 2004 issued in the Execution proceedings in respect of the said property be raised and set aside. Consequential relief is also prayed in the present chamber summons.

2. The case of the applicants is that they have purchased the disputed property under Memorandum of Understanding executed between the original owner of the property M/s.Y.A.Chunawala & Co. and between them, including the Judgment debtor, specified as the Developer. That document was executed on 14th May, 2001, whereunder, the applicants offered to pay sum of Rs.8.75 Crores, with regard to the disputed property.

3. It is seen from the assertion made in the affidavit in support of the chamber summons and the supporting documents that the applicants have by now paid sum of Rs.8,03,84,924/- in discharge of their liability. That amount is paid to Judgment debtor, developer. Before making such payment, the applicants duly issued public notice on 11th July, 2001, about their intention to purchase the disputed

property. No objection was registered with the applicants pursuant to the said public notice. The applicant also obtained No Objection Certificate from the Income Tax Department, as is required under section 269UL(3) of Income Tax Act, 1961, before making substantial payment, as it appears from the record.

4. It is also seen from the documents filed alongwith the affidavit in support of the chamber summons that possession of the disputed property has been made over to the applicants as back as in November, 2001 and they are using the said property for the purpose of running School for Nursing and providing service quarters to the resident doctors working in Hinduja Hospital, which is managed by the applicant trust. It is also seen from the record that the disputed property is described as "D" Wing, whereas, it is shown as "A" Wing in the Municipal Record. It is perhaps because of this confusion, the Judgment creditor persuaded issuance of Warrant of attachment, even in respect of the present building, in addition to other three buildings, in which it is stated that the Judgment debtor has right, title and interest.

5. From the record, which has been produced by the applicants, which remains uncontrovered, it is seen that Judgment Debtor was put in possession of the said plot only for the limited purpose of developing the same. Needless to observe that the developer has a limited right on the plot, which he undertakes to develop.

6. Be that as it may, there is ample evidence on record including correspondence between the applicants and Municipal Authorities as back as from the year 2002, after they took over possession of the disputed property from the Judgment Debtor and are enjoying the same in their own rights, as a consequence of Memorandum of Understanding executed between the original owner and the applicants. It is unnecessary to advert to various letters produced by the applicants alongwith the chamber summons exchanged between the applicants and public authorities, which relate to the disputed properties. There is also letter on record at page 56, which mentions that School for Nursing is being conducted from the disputed premises from April, 2002.

7. On the above material, the applicants claim that the Judgment debtor has no right, title and

interest in respect of the disputed premises, for which reason, the same could not have been attached, much less subjected to issuance of warrant.

8. In the first place, it needs to be mentioned that no reply has been filed on behalf of the Judgment Creditor. Counsel for the Judgment creditor makes a statement across the bar that the Judgment Creditor is not interested in filing any reply, but would contest on the legal submissions on interpretation of documents on record.

9. According to him, Memorandum of Understanding, pressed into service on behalf of the applicants, in particular paragraph No.22 thereof clearly spells out nature of the right, title and interest, in respect of the disputed premises, in favour of the Judgment Debtor developer. It is contended that in view of the said clause in Memorandum of Understanding, it will not be open for the applicants to contend that the Judgment Debtor has no right, title and interest in the disputed property. It is next contended that Memorandum of Understanding is not registered document. In other words, it is inadmissible in evidence. It is argued that as the applicants have no clear title to the

disputed premises, this Court should not interfere with the order of attachment with regard to the disputed premises.

10. Having perused the documents on record and the oral submission made across the bar, I have no hesitation in taking the view that the order of attachment passed in respect of disputed premises cannot be sustained in law. The fact that such Memorandum has been executed between the applicants and the original owners to which incidentally, the developer is also a party and signatory, is not in disputed. It is also not in dispute that applicants have paid substantial amount of Rs.8.03 crores to the Judgment Debtor after issuing public notice, as consideration for the disputed premises, in terms of the said Memorandum of Understanding. It is also not in dispute that the applicants have been put in possession of the disputed premises since November, 2001. As no reply has been filed or any positive evidence adduced by the Judgment creditor before this Court, I have no hesitation in accepting the stand of the applicants that on the above admitted facts, the question of passing order of attachment in respect of disputed premises does not arise at all.

11. Even if the argument canvassed on behalf of the Judgment Creditor that Memorandum of Understanding is unregistered document and inadmissible is to be accepted, the fact remains that it is not disputed that the applicants have been put in possession of the disputed premises and part consideration has been paid by the applicants therefor. In other words, the applicants have taken possession of the disputed property upon paying substantial consideration in part performance, for which reason in law, their possession in respect of the disputed premises cannot be disturbed. The argument of inadmissibility of the documents is of no avail in view of the provisions of section 53A of the Transfer of Property Act, 1880.

12. The counsel for the Judgment Creditor then contends that from the correspondence on record, it is amply clear that applicants have retained the sum of Rs.71 Lakhs to be made over to the Judgment Debtor, in terms of Memorandum of Understanding. It was suggested that the applicants be directed to deposit the said amount in this court, instead of paying the same to the Judgment debtor in future. This submission deserves to be stated only to be rejected. Indeed, the applicants have retained the

sum of Rs.71 Lakhs, however, that amount is to be made over to the Judgment Debtor only after the Judgment debtor completes construction in all respect. There is material on record to suggest that construction of disputed premises has been left incomplete by the Judgment Debtor.

13. Be that as it may, in the present proceedings, in my opinion, it is not open for this court to issue direction, as sought by the Judgment creditor against the applicants who are third parties. Merely because, the decree is pending for execution, does not mean that Executing court can issue direction to third party to pay the amount to the Decree Holder, as such.

14. Taking overall view of the matter, in my opinion, order of attachment, in respect of the disputed premises as passed cannot be sustained and for which reason, warrant of sale issued on 7th October, 2004 also deserves to be set aside. Accordingly, this chamber summons succeeds in terms of prayer clause (a), (b) and (c).

15. Chamber summons is made absolute in terms of the prayer clause (a),(b) and (c). No order as to

costs.